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THE ROLE OF LICENSES IN PUBLIC UTILITY SERVICES PROVISION – 19TH CENTURY EXPERIENCES

The subject of this article is a part of a broader debate related to the participation of the private sector in the execution of public services. It concerns those services which are provided to recipients in the conditions of a natural monopoly, based on a license (so with the privilege of exclusivity) awarded to private companies for executing the state's tasks. This paper aims at outlining the reasons behind the implementation of similar solutions and the problems related to entrusting the private party with satisfying public needs – problems which revealed a conflict of interest between the parties of the licensing contract.

Keywords: *natural monopoly, license, public utility, competition, municipalization.*

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MUNICIPALIZATION OF THE ECONOMIC LIFE

The problem of "municipalization of life" has been observed since the mid-19th century, manifesting in the fact that public associations take over more and more aspects of life which had previously been a part of the private sphere. In the beginning, communes were mainly entrusted with managing their own property, maintaining communal roads and supervising local police. Local police tasks included: ensuring the security of people and property, policing in the field and in markets, supervising foods, measures, weights, manufacturers, workers, and morality, acting as construction and fire police.[1] The scope of communal activities, and in particular the scope of its legally regulated tasks, was not precise and left some

[1] Examples of tasks were included in the Austrian communal act from 1862. Grzybowski Konstanty, *Historia państwa i prawa Polski. Od uwłaszczenia do odrodzenia państwa*

freedom in applying the law. Usually, everything that "directly concerned the interest of the commune and lay within its borders, that can be done and solved by the commune itself" was included in the own tasks of the commune.[2] Legal acts included examples of cases for which the commune was responsible, but the list was open-ended, complemented as needs – and the possibilities of satisfying them – grew.

Intensive industrialization and urbanization in the 19th century changed the image of towns. It also meant that everyday needs of citizens kept growing. 19th-century technological advances gradually enabled these to be satisfied in a collective way. The organizers of these services were communes, which, with safety in towns in mind, introduced modern technological solutions to improve public lighting and sanitary conditions, hiring specialized private companies for executing those tasks. Municipal services were not commonly available at first and networks usually covered only the town center and adjacent streets; they were also expensive, and therefore, unavailable for many inhabitants, but with time they became more common. At the time, communes took responsibility for making the services available to the population. One has to bear in mind that those services satisfy the needs we refer to as "elementary", "common", "daily" – shared by all inhabitants of a given territory. Satisfying them enhances the welfare and culture of the whole commune.[3] One of the many authors who emphasized the importance of communes in satisfying the needs of the inhabitants was Konstanty Krzeczkowski:

> The activity of a commune aims at satisfying all the elementary needs of inhabitants, that is, the most important individual and collective needs of people in a given territory. The more life is concentrated in some territories, the more there are local needs, and the more tasks that can be performed and regulated only by means of collective, communal effort. In scholarly discourse, this pursuit, happening constantly and ever so rightly, is referred to as the municipalization of life – that is, transferring a growing number of individual activities to the area of interest of a commune.[4]

The recurrent nature of those needs and their expansive character is inseparably connected with business activity. Business activity of public as-

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[The History of Poland and Polish Law. From Enfranchisement to the Rebirth of the State], Volume IV, Państwowe Wydawnictwo Naukowe, Warszawa 1982, p. 309.

[2] Ibidem, p. 309.

[3] Krzeczkowski Konstanty, *Gmina jako podmiot polityki komunalnej* [Commune as a subject of municipal policy], Samorząd Terytorialny, no. 3/1938, p. 17.

[4] Ibidem, p. 18.

sociations is located in the sphere referred to as the "public utility sphere". The notion of "public utility" has no single, "clear" definition, and its scope is (more or less precisely) defined by laws of individual states. For example, Henryk Hendrikson indicated that:

> The notion of public utility is difficult to define precisely, particularly since it changes over time and space. In the United States, where much has been written on the subject, it is defined by providing a list of the main economic commodities which the public opinion consistently considers to be of a general interest. [...] Since the 19th century one can notice a steady growth of industries that can be included in the definition of public utilities. This was related to numerous inventions and a general improvement in the living conditions of societies. The expansion of public utility services became one of the most important manifestations of the Wagnerian rule of expanding functions of the state and other public bodies.[5]

The range of public utility services depends on time, place, and other factors.[6] The catalog of tasks changed due to economic and political doctrines dominant in a given time, but primarily as a result of the practical challenges of economic life. Legislation in individual states has in a way been constantly redefining this notion, demonstrating the methods of performing tasks that comprise the public utility sphere.

MONOPOLY IN THE PUBLIC UTILITY SECTOR

In economics, especially in various model descriptions of the economic reality, dichotomous divisions of goods are used, and one of such dichotomies is the division into private and public goods. Private goods are those delivered (in market-regulated economies) by the market. To be more precise, those are goods which are competitive in terms of consumption and exclusive in terms of possession and enjoyment of the good (pure private goods). Taking these criteria into consideration, one can adopt an *a contrario* definition of a public good as a good for which there is no competition in terms of consumption and exclusion from consumption is impossible or

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[5] Hendrikson Henryk K., *Przedsiębiorstwa użyteczności publicznej* [Public utility companies], Samorząd Terytorialny, no. 4/1938, p. 9.

[6] For example, the scope of issues considered a part of the public interest is typically much broader during wars or crises than in times of peace and economic prosperity – the problem of food supplies can be an example.

difficult (pure public goods). In contrast to private goods, no market test is able to assess the right amount of public goods, because:

> In a purely competitive market, public goods will not be delivered at all simply because no one will agree to pay the taxes to finance them – the absolute benefits from things like public defense, elimination of fumes and noise, cleaning areas which are prone to infectious diseases etc. are awarded to everyone, regardless of who pays for them and who does not. Everyone has some reason to evade contribution.[7]

The majority of goods which are often referred to as public has, however, only one of those determinants. It concerns primarily those goods which are characterized by the lack of competition in consumption, but the "non-exclusivity" element is not present. There is a whole number of goods whose consumption can be limited by pricing. Excludability is not a matter of logic, but of costs (exclusion). Such goods include e.g. goods which satisfy individual needs in a collective manner, are supplied via networks and are priced, so they can be provided via the market. Those goods are now considered public utility goods, and the enterprises providing them are referred to as public utility companies. Those include mainly services such as: water distribution, water treatment; electricity, heating and gas supply; and local public transport.

The majority of those services can only be delivered effectively when there is just one producer (and supplier) of a given good on a given market. In this case, a natural monopoly exists, whose attribute is the economy of scale. Obtaining the economies of scale is possible where the average long-term costs decrease. This means that the bigger the volume of production, and therefore the bigger the number of recipients, the greater the profits. Establishing a network company is related to high costs of entry which include e.g. costs of building central equipment and the network. Therefore, from the economic point of view, competition in this market is not desirable, and one producer is capable of providing the good at a lower price than would be the case with several competing companies. The basic difference between a competitive market structure and a monopolized market is that in the competitive model, the price is determined by the market (the producer accepts the price), while in the monopoly model the producer determines the price. In the competitive model, the company optimizes the production to the level at which marginal cost becomes equal with

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[7] Blaug Mark, *Economic Theory in Retrospect*, Wydawnictwo Naukowe PWN, Warszawa 2000, p. 615.

the price. When selling an additional unit of production, the producer obtains the same price, so marginal revenue equals the price (in a short period of time). In the case of monopoly, similarly, the volume of production is set at the level equalizing marginal cost with marginal revenue, but it is the monopoly that sets the price, so it will be set above the marginal cost. The difference between the price and marginal revenue is evidence of the power of monopoly; one can say that the monopoly receives what is due (as in the competitive market) plus whatever its power allows it to obtain. From the economic point of view, this situation is described as ineffective. One can, then, talk about the so-called social cost of monopoly, manifested in a relatively low supply of the product at a cost higher than would be the case in a competitive setting. Increasing the sale at a given price can encounter the demand barrier (decreasing curve of monopoly demand), which means the need to lower the price for the whole production being sold. Subsequent losses are compensated by the monopoly by setting different prices of the same product for various groups of recipients (price discrimination). Recipients are divided into those for whom demand is flexible, offered the product at a lower price, and those for whom the demand is not as flexible, who pay more.[8]

Before Arthur Pigou's paper *Economics of Welfare* (1920) was published, giving the intellectual foundation for interference of public associations in the economic life, monopoly had been treated as one of the reasons of market mechanism dysfunction. This interference was manifested in the tendency to municipalize public utility companies, and in attempts to control or regulate them, from the beginning of their functioning, based on the exclusivity privilege.

The right of public associations to control a private company executing public works primarily results from the right to land transferred for use to the private party, especially when it concerns services provided via networks (e.g. street lighting, supplying gas to individual recipients etc.). Providers of these services, using the exclusivity privilege, are not forced

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[8] Within the New Institutional Economics, price discrimination is seen as a part of the theory of transaction costs and the concept of contract, and more precisely, related to atypical contracting. A hypothesis is posed that price discrimination is only a means revealing the internal power of monopoly, while the original power of monopoly is not subject to change. Interpretation of this non-standard contracting in relation to product tying was developed by Aaron Director and Edward Levi (1956); and in relation to package ordering by George Stigler (1963). Williamson Oliver E., *The Economic Institutions of Capitalism*, Wydawnictwo Naukowe PWN, Warszawa 1998, p. 38.

to compete over access rights to land, squares and streets, like in the case of other licenses. The privilege of using public land and roads is linked with the need to comply with certain conditions. Those applying for those rights have to show that they are able to use them, that is, they are in the required financial condition and they have adequate knowledge on production engineering and management. Sometimes, the public party tries to control the profit level, setting an upper price limit. It also tries to attract many bidders, although due to high risk, one can hardly expect that more than one company will apply. A dilemma might occur in the case of granting the right to build the network to more than one company, like it happened in many towns in Great Britain in the early decades of the 19th century. Cities like Birmingham, York and Edinburgh had more than one gas provider. The streets of London were also lined with gas pipes belonging to different companies. Admitting more than one company to the market was most likely aimed at boosting competition without losing the benefits related to having a small number of providers.[9] With time, it turned out that the existence of two or more competing gas plants in town created many problems and was not a desirable solution, both from the economic and the social point of view. Competing entities needed larger capital than just one plant, and interest and amortization of the bigger capital led to increasing prices for consumers. In the end, public parties withdrew from admitting free competition in these markets. For example, in London, the 13 gas plants operating in the city in 1860 were allotted separate districts.[10] Each plant was a monopolist in their own district, enjoying the exclusivity privilege. In France, the construction of a coordinated system of roads was planned, whose scheme (from 1850) assumed the existence of six regional networks. 21 independent associations were to be involved in their creation. The issue of licenses was subjected to public opinion. As a result, when designing the network, competition "in" the field was not approved, while competition "for" the field was.[11]

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[9] Millward Robert, *Private and Public Enterprise in Europe. Energy, Telecommunications and Transport 1830-1990,* Cambridge University Press, New York 205, p. 25-28.

[10] *Sprawozdanie Komisji Rady Miejskiej w Krakowie w sprawie gazowej* [A report of the city council committee in Kraków on the gas problem], National Archive in Kraków, sign. 3054, p. 10.

[11] Millward Robert, *Private and Public Enterprise...*, p. 29.

LICENSING – AN EARLY MODEL OF IMPLEMENTING PUBLIC TASKS

Licensing for public task execution has an old history, as the regulatory state function belongs to the scope of historically-shaped function of all types of power. A state regulates economic activity using its power, ownership rights, and state monopoly in some aspects of economic life.[12] Licensing means privileging some participants of economic life by making them able to function in a sphere reserved for the state. It has some features of an ordinary permission, but differs in being granted for a limited economic activity, for different reasons, and for particular aims, which also justifies the special mode of issuing a license.[13] While not giving up its monopoly, the state organizes the performance of some of its tasks, equipping the selected subject in some attributes of administrative power and some privileges.[14]

Network enterprises, emerging and developing dynamically, as the needs and possibilities resultant from the technological advances of the 19th century grew, were sometimes run directly by communes and owned by them. More often, however, private companies were hired based on a license. In most towns, the latter solution was also adopted earlier, chronologically. Private companies – natural monopolies – benefited from a real monopoly (as discussed earlier) and from a legal monopoly.

Cezary Kosikowski outlines two types of licenses which were historically formed – the French and Austro-German licenses. The type born in France is considered the classic type of license.

> In this respect, the license meant withdrawal from the national monopoly in favor of the private subjects, in order to entrust them with administrative tasks of the state which were of an economic nature. Along with the license, certain rights of the state in the sphere covered by the license were transferred (e.g. the right to expropriation, the right to maintain administrative police, the right to charge users, the right to conduct administrative enforcement procedures). The license also stipulated rules for its implementation. The following were considered fundamental features of a license: 1) it is a contract of a purely administrative character, 2) its aim is the performance of a public service, 3) the performance occurs at the risk of license-owner, 4) remuneration of

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[12] Kosikowski Cezary, *Wolność gospodarcza w prawie polskim* [Economic Freedom in the Polish Law], Państwowe Wydawnictwo Ekonomiczne, Warszawa 1995, p. 114.

[13] Kosikowski Cezary, *Koncesje w prawie polskim* [Licensing in the Polish Law], Instytut Prawa Spółek i Inwestycji Zagranicznych, Kraków 1996, p. 19.

[14] Ibidem.

the license holder is provided by awarding them the right to charge users based on a tariff, 5) it is a long-term contract. In the literature, this type of license is more often considered an administrative contract or an act comprising an administrative decision and a contract.[15]

The license type shaped based on Austrian and German scholarship had only one thing in common with the French license: it was a permission to undertake the economic activity in the sphere that was subject to state monopoly. However, these were qualified permissions of a police nature, issued in the form of an administrative decision. The license holder did not receive any rights in terms of administration, was subject to all laws, and had to pay for the license.[16]

In the 19th century, the practice of economic life gave rise to a whole variety of variously constructed license contracts. The crucial element was the license act which stipulated the conditions upon which the execution of license rights was dependent. According to the law, a number of licenses also required (along with a municipal authorization) a national authorization. This concerned mainly transport and electrification enterprises.[17] License contracts gave the license holder the right of exclusivity in terms of production and provision of a given good and the right to charge users of this good. Furthermore, they granted special rights in terms of using public property, so the right to use roads, streets, and squares, along with the right to permanent construction (e.g. pipes, tracks), and, in some cases, also the right to use private property, including the right to expropriation.[18] Companies sometimes withdrew from this last right when negotiating the conditions of the contract in return for some other additional privileges. Along with numerous rights, license holders also received numerous responsibilities, which were to balance out the rights. This balance lies in the best interest both of the local community and of the communal association, which, when drafting the license acts, should keep in mind the profits from the license and the right quality of services ren-

[15] Kosikowski Cezary, *Polskie publiczne prawo gospodarcze* [Polish Public Economic Law], Wydawnictwa Prawnicze PWN, Warszawa 1999, p. 211.

[16] Ibidem, p. 212-213.

[17] Biegeleisen Leon W., *Teoria i polityka przedsiębiorstw publicznych samorządu terytorialnego i państwa* [Theory and Policy of Public Enterprises of the Local Government and the State], Sekcja Wydawnicza Bratniej Pomocy Wolnej Wszechnicy Polskiej, Warszawa 1931, p. 248.

[18] This type of license is a thing of a past.

dered.[19] According to Leon W. Biegeleisen, a license act, especially when concerning a public utility enterprise, should have a particularly public-law character. The company licensed, although run independently, has some qualities of a public enterprise, as it enjoys special public-law. He claims that the majority of licensing contracts concluded in many Western European towns, were of a private-law nature, treating the consumers of gas and electricity like regular clients, even though license holders, at the same time, enjoyed the monopoly of using streets, and a number of other benefits resulting from their operation.[20] Public tasks transferred to private companies do not loose their public character; those are the tasks for which the state or local government should be legally accountable.[21] The state only transfers to the private subject its right to directly provide services for a limited amount of time, and organizes and supervises the process of servicing by the private subject.

Communes hired private companies to perform some of their tasks primarily because they did not have enough money to perform those costly activities themselves. They were also afraid of putting the commune into debt. Funds not spent on debt repayments could be spent elsewhere. Furthermore, economic activity was not the domain of communes. The private companies were the ones that had the right resources in the form of capital and specialized knowledge on the latest technological advances, production organization and management. They invested those resources in gas and electricity, and public transport markets acquired**.** Hiring private companies in the construction of municipal facilities made it possible to largely solve a number of problems that town authorities were struggling with.

In many licensing contracts, the private party was obliged to design, construct and finance the facilities needed to provide services, maintaining their ownership for the whole period of operation. During the operation, the company bore operational costs and financed day-to-day investments. It was also entitled to charge users for the supply (e.g. of gas).[22] In

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[19] Biegeleisen Leon W., *Teoria i polityka...* [Theory and Policy...], p. 248.

[20] Ibidem, p. 292-293.

[21] Biernat Stanisław, *Prywatyzacja zadań publicznych. Problematyka prawna* [Privatizing Public Tasks. Legal Problems], Wydawnictwo Naukowe PWN, Warszawa-Kraków 1994, p. 29.

[22] This licensing contract was similar in its construction to the DBFO model (Design-Build-Finance-Operate), one of the models of public-private partnership recommended currently by the European Commission. The first contract concluded with a private company by the magistrate in Kraków, regarding city lighting, was of a similar construction.

return for the exclusivity privilege, the private party took on (among others) the risk resulting form the specific nature of assets[23] and the operational risk. Other risks included political instability and the lack of acceptance by the local community (especially in the case of foreign companies). As to the public party, it gained an enterprise with the latest equipment, professionally organized and managed by experienced managers, without the need to borrow money and bear the risk of inefficient use of public means. However, by awarding broad rights to the company, the commune risked possible conflicts resulting from breach of contract terms by the private company, and a limitation in (or even a loss of) the possibility to supervise and control the process of rendering the service for which it remained responsible.

The risk related to starting the production and the operation of the company caused private companies to make demanding requirements in negotiating process regarding the period of operation and the amount of freedom. Contracts were usually concluded for 25-30 years, sometimes they were longer. Communes often tried to negotiate the shortest possible licensing period, which later turned out to be a mistake. The private enterprises, with a short time of operation ahead, were reluctant to conduct development investments. They were aiming at amortizing the equipment costs as soon as possible, and overexploited the plant. Longer operating periods allowed them to obtain the return on the capital invested and profits expected.

The history of public utility plants proves that terms and conditions of the contracts concluded between town authorities and private companies determined the success of the market form of operation and the expansion of public services. These terms and conditions did not always satisfy both parties, and what is more, they were often not observed. Stipulations of the contracts in many sections turned out to be detrimental for towns, which led to conflicts between the parties. There were also conflicts in terms of interpretation of some provisions included in contracts. In many countries there were even special counseling offices operating at supervisory authorities and inter-communal associations, which provided information and advice, and expressed legal and economic opinions on licensing

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This comparison aims at showing the range of tasks, not a relationship between the parties, which can hardly be described as based on partnership.

[23] Specific assets include specialized investments, permanently connected with a given territory – therefore impossible to transfer – which highly increases the investor's risk.

contracts.[24] The conflicts between the private and public parties were due to various accusations related to: the quality of services rendered, high prices, lack of development investments, ignoring technological advances, hampering quality control, making data concerning the production process and financial situation confidential, overexploitation of the company as the license expiry date was approaching, estimating the company's worth in the case of buy-out by the public party.[25] In many cases, the companies agreed to lower prices, but, although this was a step towards improving the relationship between the commune authorities and the representatives of the company, this did not solve other conflicts, especially since communes were often planning on taking over the plant. In order to force the private companies to compromise even more, communes threatened to allow competition. This is what happened in the case of conflicts between the English license holder, Continental Gas Association, and the authorities of Vienna, who ordered the company to provide lighting in the city in 1845. The license was first granted for 10 years, and later renewed. The efforts to build their own municipal gas plant (which the English company at first ignored) led in the end to the conclusion, in 1875, of a new contract, much more beneficial for the commune. The contract was an expression of improving relations between the parties: gas prices were decreased, consumers were more protected against increase in prices, and the city was to become the owner of all the facilities after 22 years.[26] A similar scenario of a "fight" against the gas company was seen in Kraków. A gas plant was built in Kraków by the German Gas Association from Dessau in 1857, pursuant to the contract regarding lighting the city with gas (for 25 years), concluded by the Kraków representatives and the legal representative of the Association on April 16, 1856. From the very beginning, the company was unpopular among the inhabitants of Kraków. People complained about poor street lighting quality and high prices. Numerous negotiations concerning gas price reduction and attempts to force the company to respect the terms and conditions of the contract bore no results. The contract was to expire in 1882, and after this time, 3 solutions were expected: 1/ renewing the contract with the German company for the next 15 years, under the same terms and conditions; 2/ buying out the plant, along with

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[24] Biegeleisen Leon W., *Teoria i polityka...* [Theory and Policy...], p. 249.

[25] More on that subject: Ibidem, p. 291-294 and other pages; Romaniuk Kazimierz, *Formy organizacyjne przedsiębiorstw komunalnych w Polsce* [Organizational forms of municipal enterprises in Poland], Kwartalnik Statystyczny, vol. 10, no. 1/1933, p. 33.

[26] Biegeleisen Leon W., *Teoria i polityka...* [Theory and Policy...], p. 266-271.

the facilities and equipment, by the city; 3/ introduction of free competition in terms of gas production and supply for city lighting and for private use.[27] The above solutions were a subject of debate in the gas consumers' association, organized upon the city council' magistrate initiative in mid-1880. The discussion was chaired by the mayor of the city himself, which emphasized the importance of the meeting. City authorities aimed at gaining support among gas consumers for the solutions suggested. The commune, nearly from the beginning of its independent existence (from 1866), planned to municipalize gas provisions, therefore the buyout of the gas plant was the preferred alternative. However, the price set by the Association was almost twice as high as the commune was willing to pay. A decision was made to build a separate plant, and thus, to enter into competition with the German gas plant. A massive action of collecting consumer declarations on the consumption of gas from the future municipal gas plant was organized. The risk of competition was something people were aware of, and the German association was under pressure to reduce the price of the plant. However, planning and works related to the construction of the municipal gas plant were continued. In the end, the authorities resorted to a "drastic" form of pressure, that is boycotting gas usage. Gas lamps were removed from the streets and replaced by oil lamps. At that time, gas consumption for public lighting decreased by 25%, and private gas recipients followed the steps of city authorities.[28] When the plans of municipal gas plant construction were advanced, the Association agreed to sell the plant to the city for approximately half of the previous price.

IN SEARCH OF OTHER ORGANIZATIONAL AND LEGAL FORMS

Until the end of the 19th century, communes mostly took over public utility enterprises, which was justified by two main motivations: 1/ fiscal – increasing budgetary income of the commune, 2/ social – protecting the interest of the local community. Studies of Kazimierz Romaniuk show

[27] CONTRACT section 21, Kraków 1856, National Archive in Kraków, sign. 3048, p. 8-9.

[28] Mleczko Grzegorz, *150 lat gazowni krakowskiej* [150 years of the Kraków gas plant], Karpacka Spółka Gazownictwa Sp. z o.o., Kraków 2006, p. 28.

that in the Second Polish Republic, licensing was one of the less common organizational and legal forms in the field of municipal activity. According to statistical data, in 1928, there were only 43 companies in Poland operating on the basis of a licensing contract, which equaled 1.5% of all municipal plants. This form was mainly used by rural communes (3.7%), and to a much lesser extent by urban communes (0.7%) and local government associations (0.8%). The majority of those plants were slaughterhouses (29) and electric plants.[29] When looking for the new organizational and legal forms of public utility companies, criticism was not spared towards the licensing model. Konstanty Krzeczkowski wrote:

> The history of municipal entrepreneurship is a great illustration of faith in new legal corporate forms. It started with various forms of licenses, each of which promised the world, but the benefits promised usually ended with the worst conflicts due to contract violations and disloyal usage of rights. Various license types, tried and tested on numerous occasions, usually resulted with the same. That is why this oldest form of running municipal companies has been completely discredited. However, even if nowadays communes sometimes need to resort to them, then even the best formed and far-sighted legal contracts cannot save the commune from abuses and dysfunctions of the economy itself. The core of those companies, their aggressive pursuit of profit will overcome all legal obstacles.[30]

There were also more moderate attitudes, which emphasized the need to protect private initiative against over-municipalization. Reasons behind the pursuit of municipalization were found e.g. in the lack of private initiative, in the specific anti-private approach of some local governments, and in the unjustified, hostile approach towards private initiative and the anti-economic education of the society.[31]

If the public utility enterprises were sill run by private companies, they were regulated. By setting maximum prices, special committees for regulating monopolies could lead to increases in production, making the market situation of a given good similar to the competitive conditions. Owing to that, the consumer obtained more goods at lower prices. In other words, the committees deprived monopolies of their power by providing them

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[29] Romaniuk Kazimierz, *Formy organizacyjne…* [Organizational Forms...], p. 34-35.

[30] Krzeczkowski Konstanty, *Zagadnienie przedsiębiorczości komunalnej* [The problems of municipal entrepreneurship], Samorząd Terytorialny, no. 1 and 2/1933, p. 25.

[31] Dimitrjew Andrzej, *Przedsiębiorstwa komunalne w ustawodawstwie polskim* [Municipal enterprises in the Polish legislation] [in:] Mieczysław Gutkowski [ed.], *Prace seminarium ze skarbowości i prawa skarbowego oraz statystyki* [Works of the seminary on finances, fiscal law and statistics], vol. 2, Vilnius 1934, p. 101.

with the so-called "fair" return on investment. However, there were controversies about the meaning of this term for the company, and about what the company's investments should include in order to provide this "fair" return.[32] Committees also regulated the level of price discrimination. Some types of discrimination were forbidden, others could be practiced if they were "reasonable". For example, it was allowed for the company to set a lower price for a service threatened by fierce competition. The problem of price discrimination raised a number of questions and doubts concerning justice, redistribution of income and economic efficiency.[33]

In the final decades of the 20th century the problem of regulation became the subject of criticism, both in the empirical domain, where it was argued that benefits were relatively small compared with the cost of regulation, and in the theoretical field, where the thesis on market regulation in public interest was questioned, emphasizing that the mechanism itself is capable of balancing out inefficiencies.[34] With the wave of regulation, various concepts were born for solving the problem of prices set on monopolist rules and the organization of this type of activity. The return of liberal movements, visible both in the doctrine and the practice of the economic life, particularly in the 1980s, was a reaction to the Keynesian model and the excessive presence of the state in the economic life. The expanding interference of the state in economic life, founded on the concept of market mechanism imperfection and the execution of the "social interest", was criticized, and gradually replaced by the theory of political mechanism dysfunction (therefore – governmental dysfunction), emphasizing the need to execute "the private interest". Focusing on the supply part of the economy resulted in efforts to expand the field of operation for the private sector. Liberalization of the economy was to be achieved by various means: the state gradually withdrew from economic life by privatizing certain spheres, monopolies were deregulated, the direct mode of executing public tasks was withdrawn from, and as a result, licenses and various permissions became elements of the legal order in many European states.

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[32] Mansfield Edwin, *Microeconomics. Theory and Applications*, W.W. Norton & Company, New York London, 1985, p. 278.

[33] Ibidem, p. 279.

[34] den Hertog Johan, *General Theories of Regulation* [in:] Bouckaert, Boudewijn and De Geest, Gerrit [ed.] *Encyclopedia of Law and Economics. The Regulation of Contracts,* vol. 3, p. 231, http://encyclo.findlaw.com/5000book.pdf (accessed on October 28, 2015).

Oliver E. Williamson wrote:

> Although monopoly-based delivery is usually effective where the economies of scale are great compared with the size of the market, it also creates some organizational difficulties. According to Milton Friedman: *There is unfortunately no good solution for technical monopoly. There is only a choice among three evils: private unregulated monopoly, private monopoly regulated by the state, and government operations.*[35]

Some economists (Demestez, Posner, Stigler) said it is possible to avoid monopolist prices by using an *ex ante* contract awarding monopoly franchise to the company which offers the delivery of the product on best conditions.[36] What seemed to be the fourth solution did not avoid criticism. According to Williamson, the argument in favor of the franchise contract can only be maintained only when the competition is effective both in the *ex ante* and *ex post* stages. He considered the efficiency of franchise contracts highly problematic, especially when the good is to be delivered in uncertain conditions and when significant specific assets must be considered.[37]

CONCLUSION

For centuries, the best forms of organizing the production of public utility goods were sought – forms which would ensure economic efficiency and protect the public interest. Market solutions, either those of the 19th century or those introduced with the liberal movement of the end of the 20th century, did not pass the test. The public model was also the subject of criticism. At present, the form which is expected to reconcile the public and private interests is the public-private partnership formula, which assumes partnership cooperation of the private and public sector entities to achieve a common goal, that is performing a given public task, without compromising their individual goals. Relationships between

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[35] Williamson Oliver E., Ekonomiczne instytucje… [The Economic Institutions...], p. 329.

[36] Demestez Harold, *Why Regulate Utilities*, Journal of Law and Economics, no. 11/68; Stigler George J., *The Organization of Industry*, Richard D. Irwin Inc., Homewood 1968; Posner Richard A., *The Appropriate Scope of Regulation in the Cable Television Industry,* The Bell Journal of Economics and Management Science, no. 3/1972, following: Williamson Oliver E., *Ekonomiczne instytucje...* [The Economic Institutions...], p. 53, 329, 415, 424, 426.

[37] Ibidem, p. 53.

the public subject and the private party, between them and the community, and between various groups of interest, play a crucial role in this model. The foundation of those relationships is loyalty and mutual trust of the partners – elements which are cultural, immeasurable and which cannot be contained in a contract.

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